IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MICHELLE A. FOX,

OPINION & ORDER

Plaintiff,

v. 14-cv-541-jdp

DANE COUNTY, SHERIFF, ADMINISTRATOR, JAIL DOCTOR, JAIL NURSES, JAIL MEDICAL STAFF, and JAIL STAFF,

Defendants.

Pro se plaintiff Michelle A. Fox, a prisoner currently housed at the Robert E. Ellsworth Correctional Center, located in Union Grove, Wisconsin, has filed this proposed civil action under 42 U.S.C. § 1983 alleging that medical staff at the Dane County Jail failed to properly treat her surgical wound when she was incarcerated there for several days in 2013. Plaintiff has made an initial partial payment of the filing fee as directed by the court, and has also submitted a motion for appointment of counsel.

The next step in this case is for the court to screen plaintiff's complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A. In screening any pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972).

After considering plaintiff's allegations, I will allow her to proceed on Eighth Amendment medical care claims against jail medical staff. I will deny plaintiff's motion for appointment of counsel without prejudice to her refiling it at a later date.

SCREENING THE COMPLAINT

1. Allegations of Fact

The following facts are drawn from the complaint and attached documents. Plaintiff Michelle A. Fox is currently incarcerated at the Robert E. Ellsworth Correctional Center, located in Union Grove, Wisconsin. However, plaintiff's complaint details events taking place in June and July 2013 at the Dane County Jail.

In late June 2013, while plaintiff was incarcerated at the Taycheedah Correctional Institution ("TCI"), she had surgery at St. Agnes Hospital, located in Fond du Lac, Wisconsin, to remove a cyst from her tailbone. This left an "exposed hole" in plaintiff's lower back about 1.5 centimeters in circumference and 2 centimeters deep.

On June 28, 2013, plaintiff was transferred to the Dane County Jail. Plaintiff's treatment plan, set by doctors at the hospital and at TCI, called for pain management, wound cleaning twice a day and dressing changes twice a day. After plaintiff told defendant deputy John Doe No. 1 about her tailbone wound, the deputy told plaintiff that her medical information and medication (Narco for pain management and an antibiotic) were transferred with her. However, during the intake process, defendant nurse Jane Doe No. 1 would not let plaintiff take her scheduled dosage of her prescribed pain medication until defendant jail doctor John Doe No. 1[1] approved the medication.

Plaintiff was escorted to the female holding block by defendant deputy John Doe No. 2. At the nightly medication pass, defendant "medication nurse" Jane Doe No. 2 told plaintiff that Dr. John Doe No. 1 discontinued her medication. Nurse Doe No. 2 told plaintiff that "she could do nothing about [her] pain but give [her] some Tylenol and Ibuprofen." Dkt. 1, at 2.

[1] Plaintiff appears to have named two different defendants as "John Doe No. 1," distinguished by job title. I will use plaintiff's numbering in this opinion.

Plaintiff requested to see the doctor. Nurse Doe No. 2 told her that she would make an appointment, but because it was Friday night, the earliest she could be seen was Monday. Plaintiff did not receive her scheduled wound cleaning or re-dressing that night.

The next morning, plaintiff told defendant "medication nurse" Jane Doe No. 3 that she could not sleep because of excruciating pain and that she had not received her wound cleaning or re-dressing. Her existing dressing became moist and plaintiff could smell the drainage. Nurse Doe No. 3 told plaintiff that staff must have been busy or "missed" plaintiff, but she would let other staff know. She did not provide further treatment.

Plaintiff was seen by defendant nurse Jane Doe No. 4 at 8:45 a.m., who stated that defendant Dr. John Doe No. 1 told her that she needed to measure the depth of her wound by inserting a cotton swab into it. (I understand this to be part of the wound cleaning procedure as well.) Plaintiff told her that she was already in pain and that she would not be able to tolerate the procedure. Nurse Doe No. 4 told her that the procedure would be "quick," but actually left the swab in her wound for several minutes, causing plaintiff extreme pain and exacerbating the bleeding and drainage. When plaintiff told Nurse Doe No. 4 to stop because of the pain, she told plaintiff that she was "finishing up" even though it took three to five more minutes. Nurse Doe No. 4 finished the procedure by re-dressing the wound.

Less than two hours later, plaintiff was seen by defendant nurse Jane Doe No. 5 for her second dressing change of the day. Plaintiff told Nurse Doe No. 5 that this was unnecessary because she had just received a dressing change. Nurse Doe No. 5 told her that she would just change the external dressing and that plaintiff would receive another dressing change that night. However, plaintiff did not receive a dressing change that night.

On June 30, 2013 at 7:45 a.m., plaintiff was seen by defendant nurse Jane Doe No. 6, who told plaintiff that she would need to measure the wound. Plaintiff told Nurse Doe No. 6

that the wound had been measured the previous day, that she was in severe pain, and that the previous day's procedure had exacerbated her bleeding and drainage. Nurse Doe No. 6 told her that she would not clean and dress the wound without doing the measurement, so plaintiff refused treatment. Plaintiff told defendant deputy John Doe No. 3 about her pain and other problems with medical staff, but he told her that the deputies have no control over medical decisions.

On the morning of July 1, 2013, plaintiff was seen by defendant Dr. John Doe No. 1. Defendant's evaluation of plaintiff's wound took less than one minute, and he said nothing directly to plaintiff. After Dr. Doe No. 1 left the exam room, defendant nurse Jane Doe No. 7 entered and told plaintiff that the doctor was discontinuing all treatment. After plaintiff complained, nurse Doe No. 7 told her to "fill out a request." *Id*. at 3. Plaintiff filed a grievance but got no response.

After filing requests for medical attention, plaintiff was seen by defendant nurse Jane Doe No. 8 the next morning. Although plaintiff told Nurse Doe No. 8 that she had not had the internal dressing changed in over two days, that the dressing was "wet with drainage and blood," and that she was not feeling well, defendant told her that she had orders to only clean the external area and remove the gauze from plaintiff's wound.

Plaintiff was returned to TCI on July 3, 2013. At the prison, plaintiff's wound was evaluated. A prison nurse noted that "there was an intense smell, a lot of green/yellow discharge, some blood discharge, serious swelling, reddish skin, and the skin was hot to the touch in the immediate area as well as extending a length up and down from the wound." *Id*. at 4. Plaintiff underwent extremely painful "deep cleaning" of the wound and her pain medication and antibiotics were reinstated. The next day, plaintiff was sent to the hospital and treated for a serious infection. She ultimately had to undergo several painful days of treatment, including a

course of intravenous antibiotics, before she recovered.

2. Analysis

Plaintiff states that she is attempting to bring Eighth Amendment medical care claims against the various John and Jane Doe defendants listed in her complaint. To state such a claim, a prisoner must allege facts from which it can be inferred that she had a "serious medical need" and that defendants were "deliberately indifferent" to this need. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. *Johnson v. Snyder*, 444 F.3d 579, 584-85 (7th Cir. 2006). A medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering, significantly affects an individual's daily activities, *Gutierrez v. Peters*, 111 F.3d 1364, 1371-73 (7th Cir. 1997), or otherwise subjects the prisoner to a substantial risk of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Plaintiff's allegations regarding her surgical wound are sufficient to meet this standard.

"Deliberate indifference" means that the officials were aware that the prisoner needed medical treatment but disregarded the risk by failing to take reasonable measures. *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997). I understand plaintiff to be alleging that each of the Jane Doe nurses, at the direction of defendant Dr. John Doe No. 1, refused to follow the treatment instructions for pain control, provision of antibiotics, and wound cleaning prepared by the hospital and prison doctors, causing plaintiff extreme pain and ultimately resulting in a serious infection. It is unclear whether these decisions violated the Constitution; inadvertent error, negligence, gross negligence, and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996). Disagreement with a doctor's medical judgment is also insufficient to state an

Eighth Amendment claim. *Gutierrez v. Peters*, 111 F.3d 1364, 1374 (7th Cir. 1997). Although it is possible that the treatment decisions made by defendant Dr. John Doe No. 1 were the result of negligence, incorrect diagnosis, or simple disagreement with plaintiff's previous doctors, it is too early to dismiss any of these arguable claims at this point of the proceedings, so I will allow plaintiff to proceed on a claim against Dr. John Doe No. 1.

Likewise, although the nurses appear to have been operating under the direction of defendant Dr. John Doe No. 1, reasonable inferences can be drawn from plaintiff's allegations that the nurses were aware of the harm to plaintiff yet followed along with inadequate treatment, which is sufficient to state claims against the nurses as well. *See, e.g.*, *Berry v. Peterman*, 604 F.3d 435, 443 (7th Cir. 2010) ("Although a medical care system requires nurses to defer to treating physicians' instructions and orders in most situations, that deference may not be blind or unthinking, particularly if it is apparent that the physician's order will likely harm the patient.")

To make the caption more clear, I will amend it to replace defendants "Jail Doctor, Jail Nurses, and Jail Medical Staff" with Dr. John Doe No. 1 and Jane Does nurses Nos. 1-8. At the preliminary pretrial conference that will be held later in this case, Magistrate Judge Stephen Crocker will explain the process for plaintiff to identify the names of the Doe defendants and to amend the complaint to include the proper identities of these defendants.

Plaintiff also mentions three John Doe deputies in her complaint, but does not allege that any of them had a hand in any medical determinations or could have done anything to improve her condition, so I will not allow her to proceed on claims against them. *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995) (liability under § 1983 must be based on defendant's personal involvement in constitutional violation). Finally, plaintiff names Dane County, the Dane County sheriff, and the jail administrator as defendants. However, she does

not allege that her treatment was the result of a county-wide policy or custom, *see Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 694 (1978), or that the sheriff or any administrative staff made any of the medical decisions at issue in the case, so she does not state claims against any of these defendants. I will, however, take judicial notice that David J. Mahoney is the Dane County sheriff and keep him in the caption for the sole purpose of serving him with the complaint so that plaintiff may make discovery requests regarding the identity of the Doe defendants.

RECRUITMENT OF COUNSEL

Plaintiff has filed a motion for appointment of counsel, Dkt. 4. The term "appoint" is a misnomer, as I do not have the authority to appoint counsel to represent a pro se plaintiff in this type of a case; I can only recruit counsel who may be willing to serve in that capacity. To show that it is appropriate for the court to recruit counsel, plaintiff must first show that she has made reasonable efforts to locate an attorney on her own. *See Jackson v. Cnty. of McLean*, 953 F.2d 1070, 1072-73 (7th Cir. 1992) ("the district judge must first determine if the indigent has made reasonable efforts to retain counsel and was unsuccessful or that the indigent was effectively precluded from making such efforts"). Plaintiff states that she sent several letters to area law firms, but that no attorney will agree to take the case, which is sufficient to show that plaintiff has made reasonable efforts.

A court will seek to recruit counsel for a pro se litigant only when she demonstrates that her case is one of those relatively few in which it appears from the record that the legal and factual difficulty of the case exceeds her ability to prosecute it. *Pruitt v. Mote*, 503 F.3d 647, 654–55 (7th Cir. 2007). Although some of the medical issues raised by plaintiff suggest that the case may indeed outstrip her abilities to litigate her claims, it is too early to conclusively make

that determination. In particular, the case has not even passed the relatively early stage in which defendants may file a motion for summary judgment based on exhaustion of administrative remedies, which often ends up in dismissal of cases such as plaintiff's before they advance deep into the discovery stage of the litigation. Should the case pass the exhaustion stage and plaintiff believes that she is unable to litigate the suit himself, she may renew her motion.

ORDER

IT IS ORDERED that:

1. Plaintiff Michelle A. Fox is GRANTED leave to proceed on Eighth Amendment medical care claims against defendants Dr. John Doe No. 1 and Jane Does nurses Nos. 1-8. The caption is amended to replace defendants "Jail Doctor, Jail Nurses, and Jail Medical Staff" with these defendants.

2. Plaintiff is DENIED leave to proceed on the remainder of her claims, and defendants Dane County, Jail Administrator, and Jail Staff are DISMISSED from the case.

3. The caption is amended to replace defendant Dane County Sheriff with David J. Mahoney for the sole purpose of serving him with the complaint so that plaintiff may make discovery requests regarding the identity of the Doe defendants. The clerk of court is directed to forward completed Marshals Service and summons forms to the U.S. Marshal, who will serve plaintiff's complaint on Mahoney.

4. Plaintiff's motion for the court's assistance in recruiting her counsel, Dkt. 4, is DENIED without prejudice.

5. For the time being, plaintiff must send defendants a copy of every paper or document that she files with the court. Once plaintiff has learned what lawyer will be representing defendants, she should serve defendants' lawyer directly rather than defendants themselves. The court will disregard any documents submitted by plaintiff unless she shows on the court's copy that she has sent a copy to defendants or to defendants' attorney.

6. Plaintiff should keep a copy of all documents for her own files. If plaintiff does not have access to a photocopy machine, she may send out identical handwritten or typed copies of her documents.

7. Plaintiff is obligated to pay the unpaid balance of the filing fee for this case in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is

directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under *Lucien v. DeTella*, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fee has been paid in full.

Entered February 9, 2015.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge